No. 12286

In the United States Court of Appeals for the Ninth Circuit

GERALD COLVIN, MRS. ROSE BORIES, ARTHUR SANDFORD AND GENEVIEVE SANDFORD, APPELLANTS

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE

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STATEMENT OF FACTS

Appellants, defendants below, appeal from final judgment of the District Court for the Northern District of California, Southern Division (R. 17–18), in an action instituted by the Housing Expediter of the Office of the Housing Expediter for restitution of rental overcharges and injunctive relief under the provisions of the Emergency Price Control Act of 1942, as amended, the Rent Regulation for Housing (8 F. R. 7322) and the Housing and Rent Act of 1947, as amended, and the Rent Regulations issued thereunder (12 F. R. 4331) (R. 2–5).

The sole issue before the trial court was the determination of the amount of the maximum rent on the two housing accommodations involved (Supp. Rec. 30–31).

To establish the facts as to the amount of maximum rent, appellee offered in evidence two documents known and described as "Registration of Rental Dwellings" describing the housing accommodations upon which appellants were alleged to have demanded and received rentals in excess of the maximum rental permitted under the Act and the Rent Regulation for Housing issued thereunder (Supp. Rec. 48) (Plaintiffs' Exhibits 1 and 2).

Appellants stipulated that the plaintiffs' exhibits were registration statements of the housing accommodations involved and were filed with the OPA (Supp. Rec. 28) but contended that such statements do not determine or reflect the maximum rent on the premises involved. All other facts as to the payment of money by the tenants or as to the period over which this amount was paid as alleged in plaintiffs' complaint were conceded by appellants (Supp. R. 29, 30, 31).

The appellants objected to the introduction of Plaintiffs' Exhibits 1 and 2 on the ground that no proper foundation had been laid for introduction of the documents, that they are not the best evidence, and that they are hearsay as to the defendants in this action (Supp. R. 32).

The Court upon submission of this sole issue after hearing the testimony of the Rent Examiner for the Office of Housing Expediter, who had custody and control of the official records relative to the maxi-

mum rents for premises located within the San Francisco Bay Defense-Rental Area (Supp. Rec. 31–32) and arguments of counsel and after deliberation, held that defendants' objections to the admissibility of the registration statements (Plaintiffs' Exhibits 1 and 2) (R. 16–17) were not well taken; and that the proper foundation for their admission as official records of the Office of the Housing Expediter was made and their admissibility as such official records noted (R. 16). Upon the evidence contained in such records, the Court entered judgment ordering a refund to the tenants of the amount collected in excess of the maximum rent permitted and restrained and enjoined the defendants as prayed for in plaintiffs' complaint (R. 17–18).

Appellants herein contend that the District Court erred in admitting into evidence appellees' Exhibits 1 and 2 which were described and identified as the registration statements of the housing accommodations herein involved (Supp. R. 31–32) and in which was stated the maximum rent received for such premises during March 1942.

Appellants further upon this appeal contend that the admission of the registration statements into evidence was improper because:

(*a*) No proper foundation was laid for their introduction into evidence.

(*b*) They were not the best evidence.

(*c*) They were hearsay as against the appellants.

Since the basis of this appeal is limited to this single issue, the appellee will consider the objections in the order assigned.

STATUTES

The pertinent statutes and regulations herein involved appear in the Appendix.

ARGUMENT

I

The District Court's conclusion that proper foundation as official records of the Office of the Housing Expediter was made and as such official records they were admissible evidence is a correct conclusion and statement of law

Contrary to appellants' contentions the District Court properly concluded that the registration statements (Plaintiffs' Exhibits 1 and 2) (Supp. Rec. 48) were admissible as evidence of the maximum legal rent of the housing accommodations involved herein under the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 50 U. S. C. A. App. Sec. 901 et seq.) and the Housing and Rent Act of 1947 (P. L. 129, 80th Cong., 1st Sess.). Maximum rents under the Emergency Price Control Act were established by Section 4 of the Rent Regulation for Housing (8 F. R. 7322).[1] Such regulation was issued pursuant to Sections 2 (b), (c) and (d) and 201 (d) of the Emergency Price Control Act and were subsequently adopted by the Housing Expediter in the Controlled Housing Rent Regulation (12 F. R. 4331)

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[1] Originally Maximum Rent Regulations 1 to 60 (F. R., Title 32, Chapter 11, Part 1388) provide:

"SECTION 4. *Maximum rents.*—Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

"(*a*) *Rented on maximum rent date.*—For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date."

issued thereunder and pursuant to the Housing and Rent Act of 1947.

Section 7 of the Rent Regulation for Housing above cited, provided as follows:

> SEC. 7. *Registration*—(*a*) Registration statement. On or before the date specified in Schedule A of this regulation or within 30 days after the property is first rented, whichever date is the later, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this regulation for such dwelling unit and shall contain such other information as the Administrator shall require. The original shall remain on file with the Administrator and he shall cause one copy to be delivered to the tenant and one copy, stamped to indicate that it is a correct copy of the original, to be returned to the landlord. In any subsequent change of tenancy the landlord shall exhibit to the new tenant his stamped copy of the registration statement, and shall obtain the tenant's signature and the date thereof, on the back of such statement. Within five days after renting to a new tenant, the landlord shall file a notice on the form provided therefor, on which he shall obtain the tenant's signature, stating that there has been a change in tenancy, that the stamped copy of the registration statement has been exhibited to the new tenant and that the rent for such accommodations is in conformity therewith.

> When the maximum rent is changed by order of the Administrator, the landlord shall deliver his stamped copy of the registration statement to the area rent office for appropriate action reflecting such change.

The particular housing accommodations involved in the present appeal were located in the San Francisco Bay Defense-Rental Area wherein as provided by the aforesaid Rent Regulation for Housing, the date for filing the registration statements respecting the housing accommodations was August 15, 1942. It was in pursuance to such Regulation that the registration statements herein (Plaintiffs' Exhibits 1 and 2) were filed by the then landlord of said housing accommodations. Consideration of the contents of the quoted section of the Regulation and the constituent elements of the records and statements herein involved, impels the conclusion that the registration statements are official records of an agency of the United States encompassed by the provisions of the statutes herein cited. The character of the records, their source and origin, their printed form and contents, as well as their filing and preservation in the custody of the Administrator of the Act leave no escape from the conclusion that these were admissible as official records.

Title 28, Sec. 1733 (b), U. S. C., *Judiciary and Judicial Procedure;* Act of June 25, 1948, provides that official government records are admissible as official records of an agency of the United States. The statutory provisions provide as follows:

> SECTION 1733. *Government records and papers; copies.—*
>
> (*b*) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the original thereof.

Into this category would unquestionably fall such official records as registration statements filed by landlords, orders relating to maximum rentals and other documents in the custody of the government agency charged with administering national rent control. The fact that the informative contents upon these registration statements were made by the original landlord of the premises should not detract in any manner from the official character and reliability of such records. The plain duty rested upon the landlord to state upon such records the maximum rent received by him on the maximum rent date, which in this particular instance was March 1, 1942, and every person is presumed to have performed a duty enjoined by law (Cf. *Athens Roller Mills, Inc.* v. *Commissioner of Internal Revenue,* 136 F. 2d 125, 128 (C. A. 6)).

Official documents (statements) required by law to be made by a nonofficial person are admissible under the exception to the hearsay rule as they are made under an official duty in the ordinary sense of duty arising from status. *Wigmore on Evidence,* 3d Ed., Vol. 5, Sec. 1633 (a), 1644, 1674 (5)).

In *Cohn* v. *United States* (1919), 258 F. 355, 362 (C. A. 2), in referring to the admissibility of docu-

ments required to be filed and kept on file in any of the executive departments as official records coming within the statutory provisions preceding the present provisions of the statute relied upon here, the Court with reference to the scope of such former provisions, declared:

> The statute authorizes the introduction into evidence of copies of any documents or papers which are required by law to be kept on file in the departments, provided such copies are authenticated under the seal of the department in which the document is kept. It is the opinion of the majority of this Court that the statute was intended to apply at least to any document or paper which is by law required to be filed and kept on file in any of the Executive Departments of the government. A document or paper which is so filed and kept on file is in the opinion of the majority of the Court an official document as much so as one which was written or published by an officer in his official character or in the performance of an official duty. The word "official" is defined in the New Standard Dictionary as follows:
>
> "1. Of or pertaining to an office or public trust; as official duties.
>
> "2. Derived from the proper office or officer, or from the proper authority; authoritative; as an official report."
>
> A paper which must be kept on file in a designated office and which cannot be removed therefrom pertains to that office, and so becomes official. And we are unable to see why the statute is not applicable to that class of official papers as well as to the other class. The one

> class is as much within the letter of the statute as is the other, and it is also as much within the reason and spirit of the statute.

(Cf. *Oakes* v. *United States,* 174 U. S. 778, 796–7).

It would thus appear that regardless of who made the entry, if it was the duty of the entrant to make such entry as part of an official record and it further became the duty of the Administrator or Expediter to keep in his custody and control the document containing such entry, the document filed or entry made would be admissible as an official record. For when an officer has a duty to do in respect to a class of things recorded under his custody, then the record as such is admissible as an official document (5 *Wigmore on Evidence,* 3d Ed., Section 1639).

Such being the fact, the custody and control of the registration statements herein referred to as Plaintiffs' Exhibits 1 and 2, were kept as part of the regular course of business of the Administrator, and plaintiffs' witness, Edith Keil, as Rent Administrator of the Office of Housing Expediter (Supp. Rec. 31) had custody and control of the registration statements identifying the lower and upper flats at 438 and 440 Lily Street, San Francisco, California.

It should be unnecessary to enlarge upon or dwell to any length on the fact that the trial court was enjoined by Title 44, Section 307, U. S. C. A., to take judicial notice of the regulation requiring this registration statement to be executed and filed by such landlords subject to the Act, and requiring such statement when so filed to be kept in the custody of the Administrator of an agency of the United States.

This doctrine has a well-settled basis (*Kiyoichi Fujikawa et al.* v. *Sunrise Soda Water Works et al.* (C. A. 9th), 158 F. 2d 490, certiorari denied 331 U. S. 832, 67 S. Ct. 1511, rehearing denied 68 S. Ct. 31, 68 S. Ct. 352; *Caha* v. *United States,* 152 U. S. 211, 221–222; *Lilly* v. *Grand Trunk Western R. Co.,* 317 U. S. 481, 488–89; *Thornton* v. *United States,* 271 U. S. 414, 420; *Tucker* v. *State of Texas,* 326 U. S. 519; *Yakus* v. *United States,* 321 U. S. 414, 435).

Appellee maintains that since Plaintiffs' Exhibits 1 and 2 (Rent Regulation Statements) were required to be executed and filed with the Administrator of the Office of Price Administration and to be kept in his custody (8 F. R. 7322), which fact was judicially noticed by the trial court (Title 44 U. S. C. A., Sec. 307), and since such official document of an agency of the United States was produced from the files of such agency and authenticated by the custodian of such files and records, a proper foundation was laid for their admission under the provisions of Title 28 U. S. C. A., Sec. 1733 (b).

In addition to the provisions of Section 1733 (b) of Title 28, U. S. C., there is a second statutory provision under which the registration statements or records concerned herein are equally admissible; namely, under Title 28, Section 1732, U. S. C., which statutory provision reads as follows:

> Sec. 1732. *Record made in regular course of business.—*
>
> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry

> in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

As we have pointed out, it was the manifest duty of the Administrator to keep and preserve such official registration statements which were made in the regular course of business. It was also part of his regular course of business to do so. Since such registration statements were received by him as is evidenced by the stipulation in the record (Supp. Rec. 28) on August 10, 1942 (Supp. Rec. 48) within the time provided by the regulations for filing same, then such registration statements are admissible under Title 28, U. S. C. A., Section 1732, as coming within the exceptions to the hearsay evidence rule. To hold otherwise or to adopt the rule of evidence contended for by the defendant in the instant case would defeat the commendable purposes of the statutory provisions, which are remedial in nature and intended to facilitate the filing of evidence where death intervenes, or where there is absence or nonavailability of those persons having personal knowledge of the facts. "The objec-

tion that the certificate [of registration] is hearsay overlooks the fact that the provision of Title 28, U. S. C. A. 1732, was enacted to remove the hardships caused by the enforcement of the hearsay rule." (*Woods* v. *14 Pine Street Corp.* (N. D. N. Y.), not reported (copy of opinion attached hereto, *infra* p. 29.) With reference to previous statutory provisions relating to the same subject matter, and in considering the purpose of the Act of June 20, 1936 (28 U. S. C., Section 695), it was said in *Harper* v. *United States,* 143 F. 2d 795, 806 (C. A. 8):

> The purpose and effect of this statute is to make admissible any writing if made in the regular course of business without the strict proof of authenticity which had heretofore been required. (*Palmer* v. *Hoffman,* 318 U. S. 109).

And in *United States* v. *Schmeller,* 143 F. 2d 544, 553 (C. A. 6), the Court said in this connection:

> The purpose of the enactment of Section 695 was to eliminate the technical requirements of proving the authenticity of business records and memoranda by the testimony of the maker.

Applying the rest of admissibility as defined in *New York Life Insurance Co.* v. *Taylor,* 147 F. 2d 297 (App. D. C.), as to the character of the records and their earmarks of reliability acquired from their source and origin and the nature of their compilation, there should be no difficulty in accepting as admissible in evidence such registration statements as are herein involved. And the trial court said (Supp. Rec. 40).

> * * * the enforcement of this statute could be completely aborted in the case of any

property owner who formerly owned property and filed a registration statement upon the ground that if that former property owner could not be obtained, his presence could not be obtained by the OPA, in enforcing this statute, to show whether or not he actually filed this document—

Under Title 28 U. S. C. A., Section 1732 (formerly Title 28 Sec. 695), a proper foundation was laid for the admission of Plaintiffs' Exhibits 1 and 2 as being records made in the regular course of business because the regulation made it a duty for any person subject to the Act to execute and file with the Administrator such registration statements. Therefore, it was in the regular course of business that such statements were made and filed and it was the business and duty of the landlord under the regulation to make and file such statements. It was in the regular course of the Housing Expediter's business to keep such statements in the files from which they were produced and authenticated by the custodian thereof. Therefore, such records having fully met the test of admissibility, any contention that they were admitted without a proper foundation is entirely without merit. (*Palmer* v. *Hoffman,* 318 U. S. 109; *New York Life Insurance Co.* v. *Taylor,* 147 F. 2d 297 (App. D. C.); *Harper* v. *United States,* 143 F. 2d 795 (C. A. 8th)).

(a) *The case of Woods* v. *Swank, 170 F. 2d 885 (C. A. 5) is to be distinguished from the present case.*—Appellant appears to be of the opinion that the case of *Woods* v. *Swank,* is on all fours with the present issue and that the trial court erred in not

following this decision. There is no merit whatsoever in appellants' contention. The trial court indicated that it had carefully considered the case of *Woods* v. *Swank* and stated "that the case does not purport to hold that such registration statements are *per se* inadmissible, but only that the facts were insufficient to justify admission in evidence in that case." In other words, in the *Swank* case, the registration was held to be inadmissible because of an inadequate foundation, but here the court found that "The proper foundation for their admission as official records of the Office of the Housing Expediter was made" (R. 16). The Court below added that if under the authority of the *Swank* case, the statements here must be rejected, it did not feel compelled to follow the cited decision "for to do so, would * * * be contrary to Congressional intent, frustrate the just enforcement of the Price Control Act in a case where the facts require a judgment for the plaintiff." (R. 17.)

We need not here determine whether or not the *Swank* case should be followed since it is clear that the facts in that case and in the present appeal are not at all parallel or as counsel contends, on "all fours." In the *Swank* case as indicated in appellants' brief, the Area Rent Director testified that he was in charge of the files in the Area Rent Office and produced from such files a registration statement which the trial court excluded on the objection of the defendant because of the failure to prove the execution, *failure to show its date and failure to show when it came into possession of the OPA, if it did* (Appellants'

Br., pp. 2 and 3). Further, the Court of Appeals held that reference to it reveals, as the lower court found, that it is without a date and there is no stamp showing when it was filed with the OPA, if it was filed at all.

Comparing Exhibits 1 and 2 (Supp. Rec. 48A) in the present case with the exhibit in the *Swank* case, we note that these exhibits indicate that they are from the Office of Price Administration and appellants so stipulated and are marked Area Office copy numbered respectively 47817 and 47819 dated August 10, 1942, and appellee stipulated (Supp. Rec. 28) that these registration statements were filed with the OPA. The facts, therefore, in the *Swank* case certainly cannot be applied to this present appeal.

Not only is the *Swank* case contrary to the subsequent decisions by the same court in *Woods* v. *Tate,* 171 F. 2d 511 and *Woods* v. *Turk,* 171 F. 2d 244 but it is also at odds with the prior decision of the court in *Morgan* v. *United States,* 149 F. 2d 185 (C. A. 5), rehearing denied, cert. denied 326 U. S. 731. This was a criminal action for violations of the Emergency Price Control Act for sale of ice above the maximum legal price. The ceiling price was fixed by regulation at the highest price at which the seller sold and delivered ice during the month of March 1942. This ceiling price was evidenced by price lists filed with the local War Price and Rationing Board which were required by regulation to be filed showing thereon the ceiling price charged for ice during the month of March 1942. To establish the

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fact of the ceiling price fixed for the sale of ice, the Government offered in evidence a memorandum taken from the files of the local War Price and Rationing Board where it was required to be kept by a clerk who was unable to testify of her own knowledge whether the Pure Ice and Storage Company filed the memorandum for the purpose of establishing its ceiling price. This memorandum or list was objected to on the ground that it was inadmissible for the purpose of showing the ceiling price because it failed to contain on its face evidence that it was filed by the Pure Ice and Storage Company or that the maximum prices reflected thereon were the prices charged by it for ice during March 1942. The evidence, however, showed that the memorandum was taken from the files of the War Price and Rationing Board in which were kept the ceiling prices of the various sellers in compliance with Maximum Price Regulations covering sales in March 1942. In reply to such objection, the Court held:

> We think the evidence sufficiently establishes the identity of the price list and its authenticity, and the court below was correct in overruling the objection thereto. Cf. *Johnson* v. *United States,* 89 F. 2d 913 (C. A. 6); *Metropolitan Life Insurance Co.* v. *Armstrong,* 85 F. 2d 187 (C. A. 8); *Lewis* v. *United States,* 38 F. 2d 406 (C. A. 9).

The same result was reached in *Bowles* v. *Kennemore,* 139 F. 2d 541 (C. A. 4) which was an action to enjoin violations of the Maximum Price Regulation pursuant to the Emergency Price Control Act of

1942. The complaint alleged that the defendant was engaged in supply services of cleaning, dyeing, pressing clothes, etc., and the maximum price therefor fixed by the regulation was the highest price charged by the seller in March 1942. The regulations as in the *Morgan* case provided that every person subject to the Act should prepare and keep on file a base period statement showing such prices and should file a duplicate thereof with the appropriate War Price and Rationing Board. A statement purporting to be signed by defendant was filed by the Greenville County War Price and Rationing Board and was produced from the files of the Board by the clerk who testified it was filed with her on September 10, 1942, and that it was the only basic sale statement pertaining to defendant's business on file. The clerk was unable to identify the signature appended to the statement and the defendant upon being called refused to testify on the ground that his testimony might incriminate him. Upon objection, the disputed document was excluded and the trial court dismissed the complaint. The Court of Appeals in a *per curiam* decision reversing the decision of the trial court and remanding the case held:

> In the pending case the similarity of the signatures was very evident. The disputed document was produced from the office where, if genuine, it was required by law to be filed, and no motive for the falsification of the paper has been suggested. Indeed, in the absence of any denial or explanation on the part of the defendant, the conclusion that the basic period statement bears his genuine signature seems to

> be irresistible. If it had been received in evidence as the act of the defendant, a prima facie case for the plaintiff would have been made out and the issuance of an injunction in the absence of any explanation or defense would have been justified. The judgment of dismissal will therefore be reversed and the case will be remanded for a new trial at which the defendant will be at liberty to present any defense which he may desire to offer (at p. 542).

The finding below that a proper foundation was laid for the admission of the registration statements is amply supported by the evidence in the case.

Plaintiff's witness identified herself as being employed by and being one of the persons having the custody and control of the official records of the Office of the Housing Expediter, San Francisco Bay Area (Supp. R. 31). She identified the Registration Statements in question as being the documents or records pertaining to and establishing the legal maximum rents for the particular rental dwelling units involved in the instant case (Supp. R. 32). She further identified said documents or records as being official records of the Office of Housing Expediter, San Francisco Bay Area. As the court below found, this testimony constituted a proper foundation for the introduction of such documents or records into evidence under the provisions of Rule 43 (a), Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723 (c) which provides in its material part:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence hereto-

> fore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.

It is, therefore, submitted that the trial court's finding that a proper foundation for the admissibility of Plaintiffs' Exhibits 1 and 2 was correct under the provisions of Title 28 U. S. C. A., Sections 1732 and 1733 (a) and Rule 43 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723 (c), and should not be disturbed.

II

There is no merit in appellants' contention that the trial court violated the best-evidence rule in admitting plaintiffs' exhibits

Appellants further contend that the best-evidence rule was violated, because the best evidence of the maximum rental was the rent actually paid on the freeze date, and, instead of such evidence, reliance was placed on a registration statement filed by the original landlord.

The appellants' resort to what is termed the best-evidence rule is, to quote Wigmore,[2] to resort to a phrase, taken from ancient history and as stated:

[2] Vol. 4, *Wigmore on Evidence*, Sections 1173, 1174.

> Rarely, the phrase is still invoked in odd connections, to justify some rule already established on definite and independent grounds.

And as Professor Thayer remarked:

> The sooner the phrase is wholly abandoned, the better.[3]

In *Maloof* v. *United States,* 159 F. 2d 62 (1946), cert. denied 331 U. S. 818, a criminal action in which the defendant was convicted for an overcharge violation of the Rent Regulation, defendant contended upon appeal that the information upon which the conviction was based was defective in failing to allege as a fact the maximum rent established by law. In answer to this contention, this Court said:

> As to the second contention: Under Sec. 11 of the said rent regulation (see F. N. 1), the maximum rent to be charged for any room, regularly rented in any defense-rental area, must be filed in the Area Rental Office. Once the maximum rent has been so filed, it cannot be changed, except by a formal order by the Area Rent Director, pursuant to Sec. 5 of the said regulation. Therefore the maximum rent of the room in question, $2, was determined and certain under Sec. 7 of the regulation noted and so alleged in the information (at p. 64).

Thus in the *Maloof* case, *supra,* which involved a criminal case where requirements of proof are stricter than in a civil suit, this Court accepted as proof of the maximum rent for a dwelling unit, the rental therefor as registered in the Area Rent Office pursuant to Section 7 of the Rent Regulation. In view

[3] Ibid., Section 1173.

of the authority of the *Maloof* case, it would appear that the registration statements offered and admitted in the instant case were admissible to establish a *prima facie* case of the maximum rent for the dwelling units herein involved. In the absence of any offer of evidence by defendants to impeach the validity, genuineness, authenticity or veracity of the statements reflecting the legal maximum rent collected on the base date, the Court below was justified in giving the evidence the weight which it did. (See *Woods* v. *Tate,* 171 F. 2d 511 (C. A. 5th).)

It should avail little for these defendants at this date to assert ignorance of the legal maximum rent of the housing accommodation and to feel aggrieved because they were precluded from cross-examining the original landlord who in 1942 officially recorded the maximum rent received during the base period. When these defendants came into possession of the premises and lacked knowledge of the maximum rent thereon, it was incumbent upon them to consult with the proper OPA authorities for such information, in order that the rent exacted from his tenants would not be at variance with the regulation. Not having done so, for aught this record revealed, they were legally chargeable with such knowledge. (See *Woods* v. *Tate,* 171 F. 2d 511 (C. A. 5th.) See too, *Greider* v. *Woods,* No. 3861 (C. A. 10th) Nov. Term 1949, not yet reported.) Cf. *Flannagan* v. *United States,* 145 F. 2d 740 (C. A. 9th), holding that: One selling beef, after publication in Federal Register of regulation fixing maximum price, is charged with knowledge of the maximum price, and *Henderson* v. *Nixon,* 168

P. 2d 594, 66 Idaho 780, which held: Publication in the Federal Register is notice of maximum rent allowed to be charged under Emergency Price Control Act of 1942 (50 U. S. C. A. App. Sec. 902).

III

Appellants' contention that the hearsay rule was violated by the trial court is without merit

Appellants contend that Appellee's Exhibits 1 and 2 were hearsay as to these appellants, since they represent a report of a third party to a government agency as to what the rent was on a certain housing accommodation on the maximum rent date. In attempting to assert that such a report is not binding nor even admissible, appellants evidently have overlooked the fact that Appellee's Exhibits 1 and 2 were registration statements and official documents of an agency of the United States and, as such, under the provisions of Title 28, Section 1733, U. S. C. Such documents were subject to the statutory exception to the so-called hearsay rule. (See *Morgan* v. *United States,* 149 F. 2d 185 (C. A. 5); *Bowles* v. *Kennemore,* 139 F. 2d 541 (C. A. 4).)

The theory of the hearsay rule, in the opinion of this appellee, is that many possibilities and sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test of security may, in a given instance, be superfluous. It may be sufficiently clear, as in the instant case, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness so that the test of

cross-examination would be a work of supererogation; or at least Congress was of that opinion in enacting Title 28, Sec. 1733, U. S. C.

No contention has been made in the present appeal that the rents, as reflected in Plaintiffs' Exhibits 1 and 2, were not the legal maximum rents under the regulation. No evidence was offered that would cast a shadow of a doubt on the authenticity of the former landlord's statement. Indeed as counsel for appellant stated to the trial court (Supp. R. 28–29):

> The COURT. Well, is there any dispute as to whether this registration statement is correct or not?
>
> Mr. FREIDENRICH. No; we do not dispute the registration statement is a registration statement. But that, in our opinion, does not determine what the maximum rent is. That is simply a report.
>
> The COURT. Well ——
>
> Mr. FREIDENRICH. Not by the defendants in this action, you [2*] see, but by some third person.
>
> The COURT. The registration statement was by a prior owner of the place?
>
> Mr. FREIDENRICH. Yes, your Honor.
>
> The COURT. Well, can't you stipulate to that, that that is so, and then leave the remaining question to be presented?
>
> Mr. FREIDENRICH. We would stipulate that this report was filed with the old O. P. A., yes, your Honor, but we would not be able to stipulate as to whether it is correct or not. We have no way of knowing that. This is simply a re-

*Page numbering appearing at top of page of original Reporter's Transcript.

> port of what the rent was on a certain date. *It might be right; it might be wrong. And we don't know anything more than that.*" [Italics supplied.]

It is presumed that every person has performed a duty enjoined by law or contract unless the contrary appears. (Cf. *Athens Roller Mills, Inc.*, v. *Commissioner of Internal Revenue,* 136 F. 2d 125, 128 (C. A. 6th) where the court inferred the taxpayer had filed a tax return.) Nothing to the contrary having been shown, it should be presumed that the former landlord filed a timely registration statement, truly reflecting the maximum rent received by him in March 1942, and that it was kept in the custody and control of the Administrator in the performance of his duty, and that it remained there until produced in court by its custodian. Clearly, appellants did not claim it was a spurious registration statement, nor is there any proof in this case upon which to reject it. The position taken by appellants would seem to indicate that the custodian of public records would be likely to perjure himself or falsify records, "but the rule and statute reasonably presume that such will not often be the case." *Banca de Espana* v. *Federal Reserve Bank,* 114 F. 2d 438, 446 (C. C. A. 2d); see also, *Minnehaha County, S. D.* v. *Kelley,* 150 F. 2d 356, 361 (C. C. A. 8th).

Applying the principle as laid down in *Woods* v. *Swank, supra,* page 886, where the Court said:

> Had plaintiff proved its (Rent Registration Statement) execution as an official memorandum or record, or that it was made in regular

course, the instrument might properly have been admissible.

Plaintiffs' Exhibits 1 and 2 were admissible.

The requirements of admissibility found lacking by the Court in the *Swank* case were unquestionably supplied in the present appeal. The registration statements, Exhibits 1 and 2, bear the date of August 10, 1942, the identifying file numbers of the Office of Price Administration (R. 48), the stipulation by appellees that these reports were filed with the OPA (R. 28), and were duly authenticated by the custodian of such official files and records (R. 31–32). *Wigmore* 3d Ed. 2158.

(*a*) *The ruling of this Court in the case of Greenbaum* v. *United States, 80 F. 2d 113 (C. A. 9th) has no application to the single issue in this appeal.*—The cases relied upon by defendants as authority to support their contentions do not sustain them. In the case of *Greenbaum* v. *United States,* 80 F. 2d 113 (C. C. A. 9th), (1935) cited by defendants, the evidence there rejected by the Court in a *criminal* case involving conviction of the defendants in using the mails to defraud, were cards purportedly containing figures taken from income-tax returns of a grocery business, offered as against the defendants personally, to show the financial condition of the company. The income-tax returns from which the cards were purportedly taken were not produced, and the cards were properly rejected as evidence by the Appellate Court as a violation of the best evidence rule since the original writings or documents themselves, that is, the income-tax reports were not produced.

That the rule enunciated in that case was to be limited solely to cases involving criminal prosecutions, where income-tax returns are material evidence, is shown by this Court's ruling at p. 126:

> An equally serious error committed in the reception of these cards was the inexplicable violation of the best evidence rule. The purported returns from which the cards were taken were made subject to sections 257, 1115, Revenue Act of 1926, which provides in part (26 U. S. C. A. § 1024 [26 U. S. C. A. § 55 and note]): "Returns upon which the tax has been determined by the Commissioner shall constitute public records. * * * Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Commissioner with the approval of the Secretary."
>
> Treasury Regulation 74, adopted pursuant to the above statute provides (section 422): "The original income return * * * or a copy thereof, may be furnished by the Commissioner to a United States attorney for use as evidence before a United States grand jury or in litigation in any court, where the United States is interested in the result. * * *
>
> 28 U. S. C. A. § 661 provides: "Copies of any books, records, papers, or other documents in any of the executive departments * * * shall be admitted in evidence equally with the originals thereof, when duly authenticated under the seal of such department."
>
> The statutes have thus carefully outlined the procedure by which original returns or their certified copies may be made available in evi-

dence. Failure to follow the same is clear violation of the best evidence rule. *Corliss* v. *United States* (C. C. A.) 7 F. (2d) 455, 457. This court has twice indicated that the method provided is the proper one when an income-tax return is material evidence in a criminal prosecution. *Gibson* v. *United States* (C. A. A.) 31 F. (2d) 19, certiorari denied 279 U. S. 866, 49 S. Ct. 481, 73 L. Ed. 1004; *Lewis* v. *United States* (C. C. A.) 38 F. (2d) 406, 413. This procedure has also received the sanction of the Seventh Circuit in a mail fraud case. *Lewy* v. *United States* (C. C. A.) 29 F. (2d) 462, 464, 62 A. L. R. 388, certiorari denied 279 U. S. 850, 49 S. Ct. 346, 73 L. Ed. 993.

The *Greenbaum* case did not refer to any official regulation or return required by law to be executed but to unsigned cards purporting to contain material copied from the original tax returns. While the witness for the government testified such cards were made in his office in the regular course of business he did not know whether they were correctly transcribed from the original return. The instant case before this Court is a civil proceeding; the original documents required by law to be filed were offered in evidence; they were authenticated by their custodian having been produced from the official files where they were required by the regulation to be kept, and thus it is clearly distinguishable from *Greenbaum* v. *United States, supra,* and governed instead by the rule generally prevailing in civil cases. (See too, *Maloff* v. *United States, supra.*)

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the District Court is correct and such judgment should be affirmed.

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APPENDIX

United States District Court, Northern District of New York

Tighe E. Woods, Housing Expediter Office of the Housing Expediter, plaintiff

vs.

14 Pine Street Corporation, defendant

MEMORANDUM

The decision in this action requires no extended discussion since the defendant offered no proof to controvert the evidence of the plaintiff, which taken together with the admissions available under the provisions of Rule 36 of the Rules of Civil Procedure, amply support the findings made herein.

As I understand the defendant's position, he relies upon his objection to the admissibility of the certificate of registration, and contends that plaintiff has, therefore, failed to make out a claim upon which relief may be granted. I see no force in its objection to the admissibility of the certificate. The defendant has failed to answer plaintiff's requests for admission, one of which refers to the authenticity of the registration certificate. The objection that the certificate is hearsay overlooks the fact that the provision of Title 28 U. S. C. A. 1732 was enacted to remove the hardships caused by the enforcement of the hearsay rule (*Palmer* vs. *Hoffman,* 318 U. S. 109). It would

also seem that the defendant must have adopted the registration certificate as filed by his predecessor owner; otherwise; he is in a position of having filed no certificate for the premises in question, and no maximum rental has been placed thereon.

Defendant's motions are considered denied.

Judgment may be entered in accordance herewith.

STEPHEN W. BRENNAN,
U. S. D. J.

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